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Supreme Court of the United States

October Term, 1953

No. 260

MORRIS KITZEN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
STUART G. SCHWARTZ
Assistant District Attorneys
Of Counsel

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Proceedings Below

On December 2, 1942, the petitioner was convicted in the Court of Special Sessions of the City of New York of the crime of Petit Larceny and sentenced to prison for a term of one year. That judgment was affirmed on appeal by the Appellate Division of the New York Supreme Court [267 App. Div. 760].

In 1952, some years after expiration of the sentence, the petitioner moved the Court of Special Sessions for a writ of error *coram nobis* to vacate the conviction. The motion was denied, and that decision was affirmed by the Appellate Division [280 App. Div. 923], and by the Court of Appeals

[305 N. Y. 756]. An application by the defendant in the Court of Appeals for leave to reargue, or, in the alternative, for an order amending the remittitur from that court to certify that questions under the United States Constitution had been passed upon, was denied [N. Y. L. J., July 16, 1953, p. 91, col. 4].

The instant petition seeks a writ of certiorari directed to the Court of Appeals to review the determination of the *coram nobis* proceeding.

Nature of the Prosecution

The defendant, a lawyer, was charged with Petit Larceny and Attempted Petit Larceny in that on three occasions he had sought to obtain money from an insurance company through false representations that an accident had occurred resulting in injury to one of his clients (20-5).* The charges were set forth in a six-count information, each transaction being described in two counts, one alleging the crime in common law form and one alleging specifically that it had been accomplished through the use of false representations (20-5). At the trial, four of the counts were dismissed at the end of the People's case, leaving two counts which referred to one of the transactions (299). At the conclusion of the trial, the court rendered a general verdict of "guilty" with respect to those two counts (428-9).

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* Unless otherwise indicated, references are to folios of the printed record on appeal from the judgment of conviction.

Questions Presented and the Respondent's Position

The principal basis of the *coram nobis* application was a contention that the trial court erred in rendering a general verdict. Specifically, the petitioner contended that, since each of the two counts of conviction involved the same transaction—one charging larceny by false pretenses, in which title to the stolen property necessarily passes, and the other charging common law larceny, in which title to the stolen property does not pass [see N. Y. Penal Law (1941) §1290; *People* v. *Lobel* (1948) 298 N. Y. 243; *People* v. *Noblett* (1927) 244 N. Y. 355]—the general verdict of "guilty" was excessively vague.

Opposing the application for *coram nobis,* the respondent pointed out that any objection to the form of the verdict, if taken at the time of conviction, could have been raised on appeal, and that, under New York law, the availability of such procedures at the time of conviction and appeal precluded later resort to the writ of error *coram nobis* [*People* v. *Sadness* (1949) 300 N. Y. 69, 74; *People ex rel. Harrison* v. *Jackson* (1948) 298 N. Y. 219, 225 (concurring opinion); *Matter of Hogan* v. *Court of General Sessions* (1946) 296 N. Y. 1, 6]. In addition, the respondent opposed the application on the merits, taking the position that, in any event, the rendition of a general verdict in this case was proper.

ARGUMENT

No Substantial Question is Presented

This Court has consistently adhered to the principle that it will not review judgments of state courts that rest upon adequate and independent non-federal grounds [*e.g.*, *Herb* v. *Pitcairn*, 324 U. S. 117, 125; *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Murdock* v. *Memphis*, 20 Wall. 590, 636]. That principle is applicable here.

In the present case, as already noted, the New York Court of Appeals refused to amend its remittitur to certify that questions under the United States Constitution had been considered. Since respondent resisted the appeal below on state procedural grounds as well as on the merits, and since motions to amend the remittitur in the fashion requested by the petitioner are a recognized part of New York practice, the Court of Appeals' denial of the petitioner's motion establishes that that court's affirmance did not constitute an adjudication of a question of federal constitutional law, but rested upon non-federal grounds.

Accordingly, the only constitutional contention open to the petitioner at this point is his argument that the rule of New York procedural law regarding the availability of *coram nobis* is so harsh that its application here constitutes a deprivation of liberty or property without due process (Def's Point I, pp. 66-71).* With

* While this contention was not one of the clearly defined issues in the Court of Appeals—as is evidenced by the denial of the motion to amend the remittitur—certain portions of the petitioner's brief below, if construed most liberally, may be interpreted as having been intended to raise the question (App's Brief, Point IV, pp. 22-9).

respect to this contention, we point out that, entirely apart from the patent reasonableness of the rule as an aid to the orderly administration of justice—it has already been at least once approved by this Court [*Paterno* v. *Lyons*, 334 U. S. 314, 319]—certainly no unconstitutional deprivation of liberty or property has resulted from the rule's application to the present case, where the judgment attacked is more than ten years old, where the sentence has long since expired, and where ample previous opportunities to present his grievances have been neglected by the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
STUART G. SCHWARTZ
Assistant District Attorneys
Of Counsel

September, 1953